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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 20, 2023

Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: **Harris County Municipal Utility District No. 171 (Applicant)**
TCEQ Docket No. 2023-0325-MWD

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing and Request for Reconsideration in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Jamison".

Jennifer Jamison, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-0325-MWD

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 171 PERMIT NO. WQ0015264001	§ § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE
TO REQUESTS FOR HEARING AND REQUEST FOR RECONSIDERATION**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ or the Commission) files this Response to Requests for Hearing and Request for Reconsideration in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by Harris County Municipal Utility District No. 171 (Applicant or Harris County MUD) for a major amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015264001. The Commission received timely comments and requests for a contested case hearing from James Donnelly, Gregory Johnston, and Christopher and Donnisha Spicer. In addition, the Commission received a timely request for reconsideration of the Executive Director’s (ED) decision on this application from Christopher and Donnisha Spicer. For the reasons stated herein, OPIC respectfully recommends the Commission find that all requestors are affected persons in this matter and grant their pending hearing requests. OPIC further recommends referring Issues No. 1 through 5 specified in Section III.I for a contested case hearing at the State Office of Administrative Hearings (SOAH) with a maximum duration of 180 days. Finally, for reasons stated below, OPIC recommends denial of the pending request for reconsideration.

B. Background of Facility

On August 25, 2021, Harris County MUD applied to the TCEQ for a major amendment to its existing TPDES permit WQ0015264001 to authorize an increase in the discharge of treated domestic wastewater. If issued, this permit would authorize an increase in wastewater discharge in Interim Phase I from a daily average flow of 0.25 million gallons per day (MGD), to an annual average flow not to exceed 1.0 MGD. In Interim Phase II, Applicant seeks to increase from a daily average flow of 0.25 MGD, to an annual average flow not to exceed 2.0 MGD. Daily average flow would increase in Interim Phase III from 0.50 MGD to an annual average daily flow of 2.9 MGD. In the Final Phase, daily average flow would increase from 1.0 MGD to an annual average flow of 3.0 MGD.

Applicant's Wastewater Treatment Facility (WWTF), the Nash FM 529 WWTF (529 facility) serves the Applicant's service area, and is located approximately 3,000 feet southwest of the intersection of Beckendorf Road and Peek Road, in Harris County. The WWTF is an activated sludge process plant operated in the extended aeration mode. The proposed discharge route for the treated effluent is to a detention basin, then to Harris County Flood Control District (HCFCD) ditch U101-00-00 (South Mayde Creek), then to Buffalo Bayou Above Tidal in Segment No. 1014 of the San Jacinto River Basin.

The unclassified receiving water uses, the designated uses, and the dissolved oxygen criterion for the receiving waters of the discharge route, according to Appendix A of 30 TAC § 307.10 (TSWQS), is limited aquatic life use and 3.0 mg/L (milligrams per liter) Dissolved Oxygen (DO) for the detention basin; minimal aquatic life use and 2.0 mg/L DO for the South Mayde Creek HCFCD ditch; and primary contact recreation, limited aquatic life use, and 3.0 mg/L DO for Buffalo Bayou Above Tidal in Segment No. 1014.

C. Procedural Background

TCEQ received the application for an amended permit on August 25, 2021, and declared it administratively complete on November 18, 2021. Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English on December 4, 2021 in the *Houston Chronicle*, and in Spanish on December 8, 2021 in the *Houston Chronicle dba La Voz*. The ED completed technical review of the application on March 21, 2022, and prepared the draft permit which, if approved, would establish the conditions under which the Facility must operate. Applicant published the Notice of Application and Preliminary Decision (NAPD) in English on August 6, 2022, in the *Houston Chronicle*, and in Spanish on August 10, 2022, in the *Houston Chronicle dba La Voz*. The comment period for the application closed on September 9, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on December 5, 2022. The deadline for filing a request for a contested case hearing or a request for reconsideration was January 4, 2023.

II. APPLICABLE LAW

A. Requests for Hearing

The Application was filed after September 1, 2015 and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under 30 TAC § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the requestor's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request. To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the ED's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and
- (5) provide any other information specified in the public notice of application.

Under 30 TAC § 55.203(a), an "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Relevant factors to be considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person;

- (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

Under § 55.203(d), to determine whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the Commission may also consider the following:

- (1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the executive director; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission shall grant a hearing request made by an affected person if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and that are relevant and material to the Commission's decision on the application.

Under § 55.211(c)(2)(B)–(D), the hearing request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201.

B. Requests for Reconsideration

Any person may file a request for reconsideration of the ED's decision under Title 30, TAC § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the ED's decision and RTC. The request must expressly state that the

person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered.

III. ANALYSIS OF HEARING REQUESTS

A. Determination of Affected Person Status

James Donnelly

James Donnelly filed timely comments on December 14, 2021, and additional comments combined with a hearing request on July 29, 2022. Mr. Donnelly's stated interests include concerns about flooding, noise pollution, and odors emanating from the facility. While issues pertaining to flooding and noise fall outside of the TCEQ's jurisdiction, Mr. Donnelly's concerns regarding odor are protected by the law under which this application will be considered. Further, Mr. Donnelly listed his address as 23918 Stockdick School Road, and stated that his property is approximately 2000 ft. from the facility. According to the map prepared by the ED's staff, Mr. Donnelly's property is located approximately 0.65 miles from the outfall and discharge route. Given Mr. Donnelly's proximity to the regulated activity and the fact that his stated concerns pertaining to nuisance odors are protected by the law under which this application will be considered, OPIC concludes that James Donnelly is likely to be affected in a way not common to members of the general public. Therefore, OPIC recommends the Commission find that James Donnelly is an affected person in this matter and grant his pending hearing request.

Gregory Johnston

Gregory Johnston filed timely combined comments and a hearing request on December 20, 2021. Mr. Johnston's request expresses concern about flooding, nuisance conditions such as odors, noise, and light pollution, and effects on property value. While the issue of odor is protected by the law under which this application will be considered, all remaining concerns fall outside the

jurisdiction of the TCEQ. Gregory Johnston listed his property's address as 23850 Stockdick School Road, which according to the map prepared by the ED's staff, is located roughly half a mile from both the outfall and the discharge route. Given Mr. Johnston's proximity to the regulated activity, and the fact that his concerns pertaining to nuisance odors are protected by the law under which this application will be considered, OPIC concludes that Gregory Johnston is likely to be affected in a way not common to members of the general public. Therefore, OPIC recommends the Commission find that Gregory Johnston is an affected person in this matter and grant his pending hearing request.

Christopher and Donnisha Spicer

Christopher and Donnisha Spicer timely filed concurrent comments and a hearing request on September 8, 2022, as well as subsequent comments and a hearing request on December 30, 2022. The Spicers' stated interests include concerns about flooding, erosion, water quality, effects on health and safety, effects on livestock, aquatic life, and wildlife, nuisance conditions such as odors and noise, effects on property value, protecting existing uses of property, and effects on groundwater. Some of these interests are protected by the law under which this application will be considered, while others fall outside the jurisdiction of the TCEQ. Christopher and Donnisha Spicer listed their property's address as 23910 Stockdick School Road Katy, TX 77493. According to the map prepared by the ED's staff, the Spicers' property is located less than mile from both the outfall and discharge route. Given the Spicers' close proximity to the regulated activity and the fact that several of the Christopher and Donnisha Spicer's interests, including nuisance odors, water quality, adverse effects on livestock and wildlife, and effects on human health are protected by the law under which this application will be considered, OPIC concludes that they are likely to be affected in a way not common to members of the general public. Further, a reasonable

relationship exists between the Spicers' concerns and the regulated activity. Therefore, OPIC recommends the Commission find both Christopher Spicer and Donnisha Spicer are affected persons in this matter and grant their pending hearing requests.

B. Issues Raised in the Hearing Requests of Affected Persons

Affected persons raised the following issues:

1. Whether the draft permit is adequately protective of human health and safety;
2. Whether the draft permit is adequately protective of livestock, wildlife including aquatic life, and the environment;
3. Whether the draft permit is adequately protective of water quality;
4. Whether the draft permit is adequately protective of groundwater;
5. Whether the draft permit contains provisions sufficient to prevent nuisance conditions, including odor;
6. Whether the draft permit adequately protects against flooding and erosion;
7. Whether the draft permit adequately protects against noise and light; and
8. Whether issuance of the amended draft permit will decrease property values.

D. Issues Raised in the Hearing Requests Remain Disputed

There is no agreement between the affected person and the ED on the issues raised in the hearing requests; thus, they remain disputed.

E. The Disputed Issues Are Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A). All issues raised by affected persons are issues of fact.

F. Issues Were Raised by the Requestors During the Comment Period

All issues were raised by the affected persons during the comment period.

G. The Hearing Requests are Based on Issues Raised in Public Comments Which Have Not Been Withdrawn

The hearing requests are based on timely comments that have not been withdrawn.

H. Issues That are Relevant and Material to the Decision on the Application

The hearing requests raise some issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii), and some that are not. To refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Water Quality, Human Health and Safety, Animal Life, and the Environment

Christopher and Donnisha Spicer raised concerns about adverse effects to water quality and the consequential impacts on human health, animal life, including aquatic life, and the environment. The Commission is responsible for the protection of water quality under Texas Water Code Chapter 26 and 30 TAC Chapters 307 and 309. The Texas Surface Water Quality Standards ("Standards") in Chapter 307 require that the proposed permit "maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and ... economic development of the state..." 30 TAC § 307.1. According to § 307.6(b)(4) of the Standards, "[w]ater in the state must be maintained to preclude adverse toxic effects on aquatic life, terrestrial life, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three." Additionally, "[s]urface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life." 30 TAC § 307.4(d). As Chapter 307 designates criteria for the regulation of water quality

and the protection of human health and safety and terrestrial life, Issue nos. 1– 3 are relevant and material to the Commission’s decision regarding this application and are appropriate for referral to SOAH.

Groundwater

Christopher and Donnisha Spicer expressed concern regarding the impact on groundwater quality and drinking water. Specifically, the Spicers noted concerns for their family’s health resulting from potential contamination of groundwater and drinking water caused by an effluent authorized in the draft permit. As discussed above, the Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC § 307 and 309. Section 309.10(b) states, in part, that, “[t]he purpose of this chapter is to condition issuance of a permit and/or approval of construction plans and specifications for new domestic wastewater treatment facilities...on selection of a site that minimizes possible contamination of ground and surface waters....” Under 30 TAC § 309.12, the Commission considers several factors relating to a facility’s proposed design, construction, and operational features to evaluate a facility’s potential to cause surface water and groundwater contamination. The rule further provides for consideration of active geologic processes and groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge, and aquifer recharge and discharge conditions. Therefore, issue No. 4 is relevant and material to the Commission’s decision on this Application.

Nuisance odors

All requestors expressed concerns regarding nuisance conditions resulting from operations under the proposed permit amendment. Under 30 TAC § 309.13(e), TCEQ requires applicants to implement a nuisance odor abatement plan. In addition, one of the purposes of

Chapter 309 is “to minimize the possibility of exposing the public to nuisance conditions.” 30 TAC § 309.10. Further, § 307.4 delineates general criteria that surface waters must meet, including aesthetic parameters which, in part, work to prevent nuisance conditions attributable to the proposed Facility. Further, 30 TAC Chapter 217, relating to “Design Criteria for Domestic Wastewater Systems” requires permit holders to ensure that facilities and systems of collection and disposal are properly operated and maintained. A goal of the Chapter 217 design, operation and maintenance requirements is to prevent adverse health effects and nuisance conditions such as those of concern to the requestors. Because 30 TAC § 309.13 addresses nuisance odors and 30 TAC Chapter 217 requires proper maintenance of facilities, Issue No. 5 is relevant and material to the Commission’s decision on this Application.

Flooding and Erosion

Requestors raised concerns regarding an increased risk of flooding on their property as well as erosion along the discharge route. The TCEQ does not have jurisdiction to consider general concerns about flooding, nor does it have jurisdiction to address erosion. With respect to this application, TCEQ has jurisdiction over issues related to water quality under the Commission’s Chapter 307 rules and site suitability under the Commission’s Chapter 309 rules. These rules have not been interpreted to address concerns that a permitted discharge of treated wastewater effluent could cause an increased risk of flooding. In this matter, OPIC cannot find that the stated concerns can be distinguished from general concerns about an increased risk of flooding.

Similarly, with respect to erosion, under 30 TAC § 309.12, “[t]he Commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction, or operational features, minimizes possible contamination of water in the state.” In making this determination

under 30 TAC § 309.12(1), the Commission may consider active geologic processes and their impact on groundwater contamination. According to 30 TAC § 309.11(1), active geologic processes consist of any natural process which alters the surface and/or subsurface of the earth, including, but not limited to, erosion. Although Chapter 309 authorizes consideration of “active geological processes,” OPIC interprets these regulatory provisions as being limited to specific existing conditions associated with a proposed site location, rather than potential erosion. Therefore, OPIC finds that the issue of potential erosion is not relevant and material to the Commission’s decision on this Application. Accordingly, OPIC cannot find that the requestors’ concerns pertaining to flooding or erosion are relevant and material to the Commission’s decision on this application.

Noise and Light

Requestors also expressed concern regarding potential noise and light pollution from the facility, and the possibility that it will significantly affect their quality of life and enjoyment of their property. While TCEQ's rules under 30 TAC Chapter 309 grants authority to condition the issuance of a wastewater discharge permit on the selection of a site that minimizes certain nuisance conditions, the TCEQ does not have the authority to address concerns about noise or light pollution when determining whether to grant a discharge permit application. Accordingly, OPIC cannot find that the requestor’s concerns regarding noise are relevant and material to the Commission’s decision on this application.

Property Values

TCEQ does not have jurisdiction to consider a proposed amendment to a draft permit’s impact on property values. Therefore, Issue No. 3 is not relevant and material.

I. Issues Recommended for Referral

For the reasons stated above, OPIC recommends referral of the following issues to SOAH:

1. Whether the draft permit is adequately protective of human health and safety;
2. Whether the draft permit is adequately protective of livestock, wildlife including aquatic life, and the environment;
3. Whether the draft permit is adequately protective of water quality;
4. Whether the draft permit is adequately protective of groundwater; and
5. Whether the draft permit contains provisions sufficient to prevent nuisance conditions, including odor.

J. Maximum Expected Duration of Hearing

Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 30 TAC § 50.115(d)(2). To assist the Commission in setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this Application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. ANALYSIS OF REQUEST FOR RECONSIDERATION

The Commission received a timely submitted request for reconsideration Christopher and Donnisha Spicer. The request expresses concern regarding the accuracy and completeness of the application, adverse effects on the health, safety, and welfare of nearby residents, and whether the application is sufficiently protective of water quality, the environment, and wildlife. An

evidentiary record on these issues would be necessary for OPIC to make a recommendation to the Commission on whether the ED's decision should be reconsidered. At this time, OPIC is recommending a hearing, but prior to the development of an evidentiary record, OPIC cannot recommend reversal of the ED's decision or remand of the application to the ED.

V. CONCLUSION

Having found that all requestors are affected persons in this matter, OPIC respectfully recommends the Commission grant the hearing requests submitted by James Donnelly, Gregory Johnston, and Christopher and Donnisha Spicer, and refer Issue Nos. 1-5 specified in Section III. I. for a contested case hearing at SOAH with a maximum duration of 180 days. Finally, OPIC recommends denial of the pending request for consideration.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2023 the Office of Public Interest Counsel's Response to Requests for Hearing and Request for Reconsideration was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Jennifer Jamison

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TCEQ DOCKET NO. 2023-0325-MWD

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